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Supreme Court of the United States

October Term, 1972

NO. 72-915

DANIEL WYATT, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IMMIGRATION AND NATURALIZATION SERVICE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Daniel Wyatt, Petitioner, prays that a Writ of Certiorari isuse to review the judgment of the United States Court of Appeals for the Fifth Circuit dismissing the above-entitled case on September 12, 1972.

CITATIONS TO OPINION BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit is printed in Appendix A hereto, *infra*, p. 8, and is reported in ____ F.2d ____.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 12, 1972. Upon application duly filed therefor, Mr. Justice Powell ordered on December 12, 1972, that the time for filing this petition for the writ of certiorari be extended to and including December 22, 1972. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an alien can be deported under 8 U.S.C. 1251 (a)(11), solely on grounds that he was convicted of violating the transfer tax provisions of the Marihuana Tax Act [26 U.S.C. § 4744(a)(2)] which, this Court has held, ". . . dealt with the kind of conduct that cannot constitutionally be punished in the first instance."

STATEMENT OF THE CASE

Petitioner is a 25-year-old native and citizen of Ireland. He entered the United States on July 22, 1964, for permanent residence. For the past four years, he has been a self-supporting student, from time to time, majoring in physics at the University of St. Thomas in Houston, Texas. On December 2, 1968, he was convicted upon his plea of guilty in the United States District Court for the Southern District of Texas, Laredo Division, of the offense of unlawfully transporting, concealing, and facilitating the transportation and concealment of a quantity of marijuana without having paid the transfer tax, in violation of 26 U.S.C. § 4744(a)(2). Petitioner was sentenced to five years imprisonment, sentence suspended, and he was placed on probation for five years without supervision. In

said sentence, the Court also "recommended that the (petitioner) be deported from the United States, and not be allowed to make application for return during the period of Probation."

Following such recommendation, the Immigration and Naturalization Service commenced deportation proceedings against Petitioner. Petitioner filed a Petition for Review of the Deportation Order of the Service, raising the same issue presented here, before the United States Court of Appeals for the Fifth Circuit which, on September 12, 1972, without written opinion, granted the Service's motion to dismiss. Thereupon, he was ordered to be ready for deportation on September 27, 1972, when this Court, on application of counsel for Petitioner, stayed his deportation on September 25, 1972, ". . . pending further order of this Court when the response of the Solicitor General is received." The Solicitor General has not yet responded, apparently awaiting the filing of this Petition.

REASONS FOR GRANTING WRIT

The facts of this case squarely present the important question whether a statute defining criminal conduct, if declared unconstitutional, is void *ab initio.*

The conviction and sentence pursuant to which Petitioner is on probation and subject to immediate deportation proceedings were imposed in violation of Petitioner's Fifth Amendment privilege against self-incrimination, as explicitly defined by this Court in *Leary v. United States,* 395 U.S. 6 (1969), decided some five months after Petitioner was convicted, viz., on May 19, 1969. The *Leary* decision involved, as does this case, the question whether Leary's conviction for failing to comply with the transfer

tax provisions of the Marihuana Tax Act violated his Fifth Amendment privilege against self-incrimination. In deciding the question affirmatively, this Court traced the history of precedent cases entailing similar problems. In *Marchetti v. United States,* 390 U.S. 39 (1968), the Court held that a plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers, as required by 26 U.S.C. §§ 4411-4412. In *Grosso v. United States,* 390 U.S. 62 (1968), the Supreme Court held that the same considerations required that a claim of the privilege be a defense to prosecution under 26 U.S.C. § 4401, which imposes an excise tax on proceeds from wagering. And in *Haynes v. United States,* 390 U.S. 85 (1968), the Court held that assertion of the Fifth Amendment privilege for the same reasons provided a defense to prosecution for possession of an unregistered weapon under the National Firearms Act, 26 U.S.C. § 5851.

In Part I (E) of this Court's *Leary* decision, the Court held that,

> "Although it would have been preferable for petitioner to have asserted the privilege at trial, we hold that in the circumstances of this case his failure to raise the issue at that time did not amount to a waiver of the privilege. See *Grosso v. U. S.*, 390 U.S. 62, 70-71 (1968)."

The aspect of the self-incrimination privilege which was involved in the *Leary* case, and which Petitioner asserts here, is the right *not* to be criminally liable for one's previous failure to obey a statute which requires an incriminatory act; i.e., the right to exemption from conviction for having failed to comply with the transfer provisions

of the Act at the time he acquired marijuana in 1968. The Fifth Circuit Court has held in *Lucia v. United States,* 416 F.2d 920 (1969),

> "The Supreme Court has repeatedly held that a party cannot be said to waive a right that was judicially created *after* the supposed waiver . . . These defendants should not be required to anticipate the Supreme Court action overruling *Lewis* and *Kahriger* and be compelled to make the futile gesture of raising the privilege at trial to preserve their rights in the event of an overriding decision. We believe the effect of the Supreme Court decisions in *Marchetti* and *Grosso* is to prevent enforcement of the wagering statutes as they are now designed because of the substantiality of the risks of incrimination . . . We conclude that Lucia's failure to raise the self-incrimination defense in the trial court and his plea of guilty did not prevent his raising the point in the present action . . . "

And this Court has held, in applying the Marchetti-Grosso rule retroactively,

> "Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the factfinding process at trial . . . Rather *Marchetti* and *Grosso* dealt with the kind of conduct that *cannot constitutionally be punished in the first instance* . . . (T)he conduct being penalized is constitutionally immune from punishment. No circumstances call more for the invocation of a rule of complete retroactivity."

United States v. United States Coin and Currency, 1971, 91 S.Ct. 1041, 1045.

The Fifth Circuit Court has said, in *Harrington v. United States*, 444 F.2d 1190, 1192-3 (1971):

> ". . . Since the first part of *Leary*—i.e., that dealing with the constitutionality of the transfer tax provisions of § 4744—and *Marchetti-Grosso* are but variations of a single theme, both must be retroactive. Since Harrington was convicted for violating the statute overturned in the first part of *Leary*, that count of the conviction cannot stand . . . This Court cannot charge persons convicted under the tax count with knowing that *Leary* would be retroactive, when we ourselves were uncertain of the eventual outcome. Therefore, Harrington's motion to vacate his conviction and sentence under 26 U.S.C.A. § 4744(a) (1) must be granted."

Mr. Justice Brennan said in the *Coin and Currency case*, 91 S.Ct. 1041, 1047, in treating an unconstitutional statute as void *ab initio*:

> ". . . (A) decision holding conduct beyond the power of government to sanction or prohibit must be applied to prevent the continuing imposition of sanctions for conduct engaged in before the date of that decision. For the decision does far more than cast doubt upon the reliability of the guilt-determining process. It makes the question of reliability irrelevant, for it establishes beyond peradventure that the government has no legitimate interest in punishing such conduct at all . . . Accordingly, it may no longer continue to punish it."

CONCLUSION

Because the Immigration and Naturalization Service is continuing to attempt to impose sanctions against Petitioner predicated upon his invalid conviction, this Court

should clarify and define the scope of consequences, *if any*, that may flow from a conviction under a statute that is subsequently invalidated, and therefore grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of December, 1972, a copy of the foregoing Petition for Writ of Certiorari was served upon the Solicitor General by mailing same to the Hon. Erwin Griswold, Office of the Solicitor General, United States Department of Justice, Washington, D.C. 20530, postage prepaid.

Ben G. Levy

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2617

DANIEL WYATT, *Petitioner,*

versus

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

Petition for Review of An Order of the Immigration and Naturalization Service (Texas Case)

(Filed September 12, 1972)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that respondent's motion to dismiss the petition, filed in the above styled and numbered cause, is hereby GRANTED.



In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-915

DANIEL WYATT, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, an alien, challenges an order of deportation on the ground that the conviction on which it is based violated his privilege against self-incrimination. Petitioner is a native and citizen of Ireland who has resided continuously in the United States since his admission for permanent residence on July 22, 1964 (R. 8).[1] On September 27, 1968, he pleaded guilty in

[1] No record accompanied the petition for certiorari, which seeks review of the dismissal by the court of appeals of a second petition for review of a deportation order. The order is based on a criminal

the United States District Court for the Southern District of Texas to the third count of a three-count indictment, charging that he transported and concealed a quantity of marihuana without having paid the required transfer tax, in violation of former 26 U.S.C. 4744(a)(2) (R. 1-5).[2]

1. Before accepting the guilty plea, the court advised petitioner, in the presence of his counsel:[3]

> I also feel it my duty to tell you that as to the third count of the indictment you have a possible defense available to you if you desire to assert your rights against self-incrimination, a right under the Fifth Amendment to the Constitution. If you plead guilty, you will be waiving that right, and I want you to do it knowingly and aware that it is available to you. Is that the case?

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conviction which petitioner unsuccessfully sought to have vacated by the sentencing court following the court of appeals' affirmance of the order in the first review proceeding. We have secured copies of the relevant documents, assembled them chronologically, and numbered the upper right-hand corners of the pages to facilitate reference. "R." refers to the informal record, which we are lodging herewith.

[2] This was the offense with respect to which this Court, eight months later, in *Leary* v. *United States*, 395 U.S. 6, held that a timely and proper assertion by a defendant of his Fifth Amendment privilege against self-incrimination is a complete defense (395 U.S. at 12-29).

[3] The arraignment occurred eight months after the decisions in *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v. *United States*, 390 U.S. 85, in which this Court had held that the Fifth Amendment privilege (if not waived and if seasonably asserted) is a defense to prosecutions under similar statutes.

Petitioner then expressly acknowledged that he was waiving his Fifth Amendment right and reaffirmed his desire to plead guilty (R. 4-5). On December 10, 1968, petitioner was sentenced to five years' imprisonment, execution of the sentence was suspended, and he was placed on unsupervised probation for five years. The court recommended that petitioner be deported from the United States and that he not be allowed to make application for return during the probationary period (R. 6). The court contemporaneously, on motion of the government, dismissed the other two counts of the indictment, each of which charged a more severely punishable offense than that to which petitioner had pleaded guilty (R. 1, 6).[4]

2. On October 24, 1969, on the basis of this conviction, petitioner was ordered deported as an alien who had been convicted of a violation of a law governing the taxing or transportation of marihuana (see 8 U.S.C. 1251(a)(11)), and on July 31, 1970, an appeal by petitioner from the order was dismissed by the Board of Immigration Appeals (R. 7-11).[5]

On September 28, 1970, petitioner filed in the court

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[4] The offense to which petitioner pleaded guilty was punishable by not less than two nor more than ten years' imprisonment (plus an optional fine of not more than $20,000); suspension of sentence and probation were available (former 26 U.S.C. 4744(a)(2) and 7237(a)). The dismissed counts, charging smuggling and illegally transporting twenty pounds of marihuana in violation of former 21 U.S.C. 176a, carried a mandatory prison term of not less than five nor more than twenty years' imprisonment (plus a fine), without possibility of suspension of sentence or probation (former 26 U.S.C. 7237(d)).

[5] A prior deportation order had been vacated by the court of appeals for reasons not now relevant (R. 8-9).

of appeals a petition for review of the deportation order, pursuant to 8 U.S.C. 1105a, contending that the order was void under Leary v. United States, 395 U.S. 6 (see note 2, *supra*) (R. 12-14). The Immigration and Naturalization Service, in reply, noted that petitioner's conviction was still outstanding, that it made him expressly deportable under Section 1251(a)(11), and that his proper course, if he believed the conviction constitutionally vulnerable, was to seek to have it vacated by the court in which it had been entered, pursuant to 28 U.S.C. 2255. If he succeeded, the Service observed, he could move to have the deportation order administratively vacated, in reopened proceedings, as no longer having a foundation in the record (R. 22-23). On February 22, 1971, the court of appeals affirmed the deportation order without opinion (R. 27; 439 F. 2d 152).

3. On June 3, 1971, petitioner filed in the district court a motion under Section 2255 to vacate his conviction on the ground that it was void under *Leary* (R. 28-31). On August 4, 1971, the court, in a memorandum opinion, denied the motion on the ground that petitioner, in the course of pleading guilty, had expressly waived his Fifth Amendment privilege (R. 32-35).

On August 30, 1971, petitioner filed a notice of appeal from the denial of the Section 2255 motion (R. 36) and, noting that he was facing imminent deportation, filed in the court of appeals a motion for a stay of deportation pending the appeal (R. 37-38). On the same day, the clerk of the district court transmitted the record of the Section 2255 proceeding to the court of appeals. On September 9, 1971, the court of appeals (*per* Circuit

Judges Coleman and Simpson) denied the requested stay without opinion (R. 39) and the clerk of the court of appeals returned the record to the district court with a copy of the order (R. 40). The accompanying letter of transmittal, a copy of which was sent to petitioner's counsel, advised the district court clerk that at the direction of the court of appeals "the record on appeal, which was forwarded by your office directly to Judge Coleman, is being returned herewith" (R. 40). Petitioner did not further prosecute his appeal at that time.

4. Ten and a half months later, on July 28, 1972, petitioner filed in the court of appeals a second petition for review of the deportation order (R. 41-45). Noting that he was facing imminent deportation (R. 42),[6] petitioner again claimed that the order was void under *Leary* (R. 42-43). Acknowledging that the court had upheld the order 17 months previously in the first review proceeding, he asked the court to reconsider its prior action in the light of intervening decisions which he claimed to be relevant (R. 43-45). The petition also referred to his unsuccessful effort in the interim to have the district court vacate the conviction, and urged that the denial of that motion had been error (R. 43-44).

The Service moved to dismiss the petition, contending that it was frivolous and had been filed merely to delay enforcement of the deportation order (R. 46-49). In tracing the antecedent proceedings, the Service re-

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[6] Service of the petition stayed enforcement of the order. 8 U.S.C. 1105a(3). The record does not show why petitioner had not been deported following the denial of a stay by the court of appeals in September 1971.

ferred to the court of appeals' order of September 9, 1971,[1] denying the requested stay of deportation pending appeal from the denial of the motion to vacate, as having "denied the appeal by * * * [denying the stay]" (R. 48). In a reply to the motion to dismiss (R. 50-51), petitioner disputed the Service's characterization of the order, stating that although the court of appeals had denied his application for a stay it had not ruled on the merits of his constitutional claim (R. 50). Noting that the record of the Section 2255 proceeding had been returned to the district court following denial of the stay, petitioner requested permission to retransmit the record to the court of appeals and to docket the appeal out of time or to consolidate the Section 2255 proceeding with the pending review proceeding (R. 50-51).

On September 12, 1972, the Service's motion to dismiss was granted without opinion (R. 52).

5. The court of appeals' disposition of the petition was appropriate and no question meriting further review is presented.

a. The dismissal of the second petition for review was a proper exercise of discretion. Although petitioner had filed a notice of appeal from the denial of the Section 2255 motion, he had not pursued it to final judgment. The only request he had made of the court of appeals with respect to the appeal had been to ask that his deportation be stayed. That motion had been denied and the record of the Section 2255 proceeding (which

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[1] The motion inadvertently referred to the date of the order as September 13, 1971. That was the date the order was filed in the district court (R. 39).

had been sent to the court of appeals for its consideration in connection with the stay request) had, with notice to petitioner's counsel, been returned to the district court. Petitioner had taken no further action until deportation had again become imminent. The court of appeals could properly have concluded in these circumstances that the filing of the second review petition was an abuse of the prescribed processes for securing review of a deportation order, and that to permit petitioner to docket his appeal substantially out of time would be inconsistent with the policy of preventing delays in the enforcement of deportation orders through dilatory tactics. See *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217.

b. In any event, petitioner's underlying claim—that his conviction is invalid—has no merit. In *Leary* this Court held only that a timely and proper assertion of one's privilege against self-incrimination is a defense to prosecution under former 26 U.S.C. 4744(a)(2) (see 395 U.S. at 27-29). The Court's discussion (*ibid.*) makes it plain that that defense could be waived. In the companion case to *Leary*, *United States* v. *Covington*, 395 U.S. 57, 59, the Court explained *Leary* as holding that the Fifth Amendment provides a defense to prosecution "unless the plea is untimely * * * or the privilege has been waived." And then in *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, 723, the Court reiterated that the Fifth Amendment defense could be waived.

Here, petitioner orally acknowledged his awareness of a possible Fifth Amendment defense and expressly waived it in the presence of counsel. Petitioner obvi-

ously decided, after full advice, to waive a defense to the relatively less severe tax charge in order to avoid the substantial risk of conviction on the more serious counts, to which he had no Fifth Amendment defense.[8] In these circumstances, the plea of guilty constituted a knowing and understanding waiver of his Fifth Amendment defense, and petitioner should not be heard to attack the validity of the "bargain" he voluntarily struck. See *Brady* v. *United States*, 397 U.S. 742, 752-753, 756-758; *Henry* v. *Mississippi*, 379 U.S. 443, 449-452. See also *Palacios* v. *Britton*, No. 72-5460, leave to file petition for habeas corpus denied January 22, 1973.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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[8] It is immaterial that petitioner's guilty plea, which was entered subsequent to the decisions in *Marchetti*, *Grosso*, and *Haynes* (see note 3, *supra*), was entered prior to the decision in *Leary*. See *Smedberg* v. *United States*, 448 F. 2d 401 (C.A. 5).

☆ U.S. Government Printing Office: 1973—494-901/31